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# In the Supreme Court of the United States

OCTOBER TERM, 1937

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No. ——

UNITED STATES OF AMERICA, PETITIONER

*v.*

PETE MCGOWAN, CLAIMANT OF ONE CHEVROLET COUPE, ENGINE NO. 348804, AND DOCK DICK AND ALBERT CHARLEY, CLAIMANTS OF ONE CHEVROLET SEDAN, ENGINE NO. 4527104

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issued to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on March 15, 1937, affirming the decree of the District Court of the United States for the District of Nevada which ordered the dismissal of libels seeking the forfeiture of two automobiles alleged to have been used in the introduction of intoxicating liquor into the Indian country. (R. 40).

## OPINIONS BELOW

The opinion of the District Court (R. 35–40) is reported in 16 F. Supp. 453. The opinion of the Circuit Court of Appeals has not yet been reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the Reno Indian Colony is "Indian country" within the meaning of the special Indian liquor laws prohibiting the introduction of intoxicating liquors into such country.

## STATUTES INVOLVED

U. S. C., Title 25, Section 241, prohibiting the introduction of intoxicating liquor into the Indian country; Section 244, penalizing the possession of such liquor therein; Section 246, providing for the seizure and forfeiture of the liquor and certain vehicles, and Section 247, providing for the forfeiture of automobiles and other vehicles used in the introduction of the liquor, are set forth in the Appendix, *infra*, pp. 18–20.

STATEMENT

On July 31, 1935, two libels were filed in the District Court of the United States for the District of Nevada for the forfeiture of the two automobiles involved in the above-entitled cause because they were used in the introduction of spirituous liquor into the Indian country, to-wit, the Reno Indian Colony. (R. 2–4; 19–21.) The claimants answered and petitioned for the return of the automobiles on the grounds, among others, that the place of seizure, to-wit, the Reno Indian Colony, was not Indian country; that the special Indian liquor laws did not, therefore, apply to this colony, and that the colony was a part of the State of Nevada and not subject to the jurisdiction of the United States District Court. (R. 16–18; 31–34.)

The two cases were consolidated for trial. (R. 35, 46.) The District Court made findings of fact and conclusions of law. (R. 46–49.) There is no dispute as to the pertinent facts. The court's Findings of Fact II–IV were as follows (R. 46–48):

II

That said Reno Indian Colony consists of a tract of land containing 28.38 acres, or thereabouts, and is situated near the easterly city limits, City of Reno, Washoe County, State of Nevada, and between said City of Reno and the City of Sparks, Washoe County, State of Nevada.

III

That some 20 acres of said tract of land comprising said Reno Indian Colony was deeded by deed dated March 8, 1917, by Ione Gould Lewis and John A. Lewis, her husband, as grantors to the United States of America, as grantee, and that the consideration paid to said grantors by the grantee was the sum of Six Thousand ($6,000) Dollars; the said consideration being paid in equal parts from two items contained in the Interior Department appropriation act for the fiscal year 1917, (39 Stat. 1, 123, 143). The items read as follows:

"For the purpose of procuring home and farm sites, with adequate water rights, and providing agricultural equipment and instruction and other necessary supplies for the non-reservation Indians in the State of Nevada, $15,000; Provided, That no part of this appropriation shall be expended for mileage, salaries, or expenses of employees, * * *.

"For the purchase of land and water rights for the Washoe Tribe of Indians, the title to which is to be held in the United States for the benefit of said Indians, $10,000, to be immediately available; for the support and civilization of said Indians, $5,000; in all, $15,000."

IV

That eight and thirty-eight hundredths (8.38) acres or thereabouts of the tract of

land comprising said Reno Indian Colony was deeded by deed dated January 22, 1927, by Lorens M. Christensen and his wife, Marie Christensen, as grantors, to the United States of America, as grantee, and that the consideration paid by the said grantee to the said grantor was Four Thousand One Hundred and Sixty Dollars ($4,160); that said consideration was paid from funds appropriated under Act of May 10, 1926 (Public No. 207), (44 Stat. L., Chapter 278, P. 496) reading as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized to purchase a certain described tract of land containing approximately eight and forty-two hundredths acres, situated in section 7, township 19 north, range 20 east, Mount Diablo meridian, in Nevada; the proper description and area of said tract to be definitely determined by metes and bounds: Provided, That the said land when purchased shall be added to and become a part of the site for the Reno Indian colony heretofore purchased by the Government: Provided, further, That the sum of $4,300 is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, said appropriation, or so much thereof as may be needed, to be used in purchasing the tract of land hereinbefore described."

It was conceded that the State of Nevada by special act never relinquished jurisdiction over the land in question, nor was any procedure taken to comply with the general law (Nevada Comp. Laws, Sec. 2895) respecting relinquishment of jurisdiction (R. 36).

The Government contended in the District Court that the Reno Indian Colony was in effect an Indian reservation and hence should be regarded as Indian country within the meaning of the special Indian liquor laws (R. 37).

In concluding as a matter of law that the Reno Indian Colony was not Indian country within the meaning of the Federal statutes and that the libels should be dismissed and the property seized restored to its owners (R. 49), the court disagreed with the Government's position, saying in its opinion (R. 39–40):

> As the Indian has advanced in civilization it has apparently been the policy of the Department of Indian Affairs to acquire tracts of land immediately adjacent to cities and towns upon which Indians could reside and have the advantages of closer relations with the white citizens. Indians residing upon such tracts have the advantage of the public school system, and there is also afforded greater opportunity for gainful employment. Such tracts of land have never been regarded as Indian Reservations. Indian Reservations are generally if not universally so designated. To distinguish its

purpose, the tract here in question was designated Reno Indian Colony, and so recognized by that name by Federal statute. Tracts of land acquired and set apart for a particular purpose of Indian welfare are not a reservation, or otherwise to be regarded as Indian country in the sense that expression is used in the statute.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit. The claimants, being Indians without funds, did not appear in the appellate court. That court, in affirming the decision of the District Court, held that the lands in question could not be regarded as Indian lands from any standpoint; that they were not part of the domain to which any Indian title attached, having been bought by the United States from Mexico pursuant to the Treaty of Guadalupe Hidalgo of 1848 and the United States having thereafter been divested of its title under its public land laws; that the lands had not been set apart or designated exclusively for an Indian tribe; that the lands had been purchased by the United States from private owners without the consent of the legislature of Nevada for a specific purpose, namely, for home and farm sites and water rights for non-reservation Indians in Nevada and for the Washoe Tribe of Indians; that the sovereignty and jurisdiction of Nevada over this land was exclusive because the operation of its laws did not impair the enjoyment by the United States of its right to use

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the lands for the purposes for which purchased; and that for the court to extend the criminal laws of the United States over the sites in question under the guise that they are Indian country would amount to legislation, which is a matter for Congress, by and with the consent of the State legislature.

### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Reno Indian Colony is not "Indian country" within the meaning of that term as used in the special Indian liquor laws.

2. In holding that the special Indian liquor laws are not applicable to the Reno Indian Colony.

3. In affirming the decree of the District Court dismissing the libels.

### REASONS FOR GRANTING THE WRIT

1. The decision below is, we submit, erroneous. There are several fundamental errors in the reasoning which led the Circuit Court of Appeals to the conclusion that the Reno Indian Colony is not Indian country.

A. The court makes reference to the fact that the lands in the Reno Indian Colony were never part of a domain to which any Indian title attached, pointing out that the lands were acquired by the United States from Mexico by treaty, that the United States was divested of its title thereto under its public land laws, and that the lands were

thereafter purchased by the United States from private owners. It was, however, settled by this Court in *Donnelly* v. *United States,* 228 U. S. 243, that the term "Indian country" is not confined to lands to which the Indians retained their original right of possession or to lands previously occupied by them. The Court said (pp. 268–269):

> 4. It is contended for plaintiff in error that the term "Indian country" is confined to lands to which the Indians retain their original right of possession, and is not applicable to those set apart as an Indian reservation out of the public domain, and not previously occupied by the Indians.
>
> Sections 2145 and 2146 are found in Title XXVIII of the Revised Statutes, which title relates to Indians, and within chap. 4, the sub-title of which is "Government of Indian Country."[1] Section after section in that chapter contains provisions of law applicable only to Indian country, and yet the act contains no definition of that term. In the Indian Intercourse Act of June 30, 1834, 4 Stat. 729, c. 161, the first section defined the "Indian country" for the purposes of that act. But this section was not reacted in the Revised Statutes, and it was therefore repealed by §5596, Rev. Stat. *Ex parte Crow Dog,* 109 U. S. 556, 561;

[1] The sections of the Revised Statutes out of which grew two of the sections of the United States Code involved herein (U. S. C., Title 25, Secs. 241 and 246) are found in the same title, chapter, and subtitle.

*United States* v. *LeBris,* 121 U. S. 278, 280; *Clairmont* v. *United States,* 225 U. S. 551, 557. Under these decisions the definition as contained in the act of 1834 may still "be referred to in connection with the provisions of its original context that remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." With reference to country that was formerly subject to the Indian occupancy, the cases cited furnish a criterion for determining what is "Indian country." But "the changes which have taken place in our situation" are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian country," within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

B. The Circuit Court of Appeals also made reference to the fact that the lands in the Reno Indian Colony had not been set apart or designated exclusively for an Indian tribe. What the court apparently meant was that, as was held by the District

Court (R. 39), the Reno Indian Colony was not specifically designated as an Indian reservation. Under the decisions of this Court, this would, however, seem to be too narrow a construction of the term "Indian country." This Court has, for example, held that land, formerly a part of an Indian reservation, which has been allotted to an Indian, is Indian country during the trust or restricted period within the meaning of legislation designed for the protection of the Indians. *United States* v. *Ramsey,* 271 U. S. 467; *United States* v. *Pelican,* 232 U. S. 442. The reason for such decisions is, of course, that the Indians occupying such lands are, as was indicated in the *Pelican* case (p. 450), still wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition, the restrictions imposed being part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship.

In the instant case it will be observed that the Indians involved do not have even the status of an allottee with a qualified title, since full title to the lands is to be held in the United States. Moreover, the Act under which the lands were purchased provided (*supra,* p. 4) that the purpose of the appropriation was not only to procure home and farm sites, with adequate water rights, but to provide agricultural equipment and instruction and

other necessary supplies for the nonreservation Indians of the State of Nevada. With respect to the land and water rights purchased for the Washoe Tribe of Indians, the title was to be in the United States "for the benefit of said Indians" and an appropriation was made "for the support and civilization of said Indians." It is obvious, therefore, that in acquiring these lands the United States was not only motivated by the desire of furnishing home and farm sites for the Indians, but further recognized their dependent status as wards of the United States by making provision for the support, instruction, and civilization of these Indians. The special Indian liquor laws are designed for the protection of such wards. It would seem, therefore, that even if the Reno Indian Colony may not be regarded technically as an Indian reservation, it comes within the purview of the term "Indian country" under the comprehensive decisions of this Court construing that term.

In any event, we submit that, although the Reno Indian Colony was not specifically designated as such, it was in effect an Indian reservation. It is well settled that an Indian reservation is Indian country. *Donnelly* v. *United States, supra; Pronovost* v. *United States,* 232 U. S. 487, 489. Not only is it immaterial that such a reservation may have been created from lands not previously occupied by the Indians (*Donnelly* v. *United States, supra*), but it is not essential that there be a formal cession or formal act setting apart a particular tract. A

reservation is in fact created if, from what has been done, a certain tract is held exclusively for Indian occupation. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 390. The title to the lands in the Reno Indian Colony is to be held in the name of the United States and they were acquired by the United States exclusively for the occupation, use, and benefit of the Indians as dependent wards of the Government. This Indian colony would seem to have all the attributes of an Indian reservation, and there would appear to be no good reason why any distinction with respect to the application of the Indian liquor laws should be made between such a colony and lands specifically designated as an Indian reservation. In order that the purposes for which this colony are maintained may be fully accomplished, it is as necessary to keep liquor from the Indians in this community as from those residing on a reservation. This Court has maintained the guardianship of the Federal Government over dependent Indian communities wherever possible. *United States* v. *Kagama*, 118 U. S. 375, 383–384; *United States* v. *Nice*, 241 U. S. 591, 597–598. Thus, in *United States* v. *Sandoval*, 231 U. S. 28, where the question was whether the Indian liquor laws applied to the Pueblos of New Mexico and whether the lands were Indian country, it was said (pp. 45–46):

> But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether

> Indian communities within the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations. See *Pollard* v. *Hagan,* 3 How. 212, 225. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.

It is apparent, therefore, that this Court has never hesitated to give the term "Indian country" as used in the Federal statutes a broad construction wherever necessary properly to protect dependent Indian wards and communities.

C. A basic error in the reasoning of the Circuit Court of Appeals was its assumption that the Indian liquor laws can have no application to the Reno Indian Colony because the Government acquired the lands in that colony without the consent of the State legislature. The confusion in the court's reasoning is in its view that the application of these laws depends upon the exclusive-legislation clause of the Constitution. (Article I, Section 8, clause 17.) As is apparent from the quota-

tion in the *Sandoval* case, *supra,* the power of Congress to enact the Indian liquor laws arises from the constitutional provision authorizing it to regulate commerce with the Indian tribes (Article I, Section 8, clause 3), and also from the power and duty of the Government to exercise a fostering care and protection over all dependent Indian communities within its borders.

There is nothing in *Surplus Trading Company* v. *Cook,* 281 U. S. 647, relied upon by the court below, which has any bearing upon this case. We are not here concerned with the question as to the extent to which State laws may operate upon lands acquired by the United States without the consent of the State. If, as we submit, the lands in question were Indian country, there can be no doubt as to the power of Congress to prevent the introduction therein of intoxicating liquors, irrespective of whether the lands were purchased with or without the consent of the State. Cf. *United States* v. *Sandoval,* 231 U. S. 28, 49, *supra.*

2. An authoritative decision by this Court is necessary for the guidance of the Indian Office.

The Bureau of Indian Affairs has always regarded the Reno and similar Indian colonies as Indian country so far as the application of the Indian liquor laws is concerned. Any doubt as to the propriety of this interpretation should be resolved in favor thereof, unless clearly arbitrary. It has long been settled that where ambiguity or uncertainty exists in a statute great weight will be given

by this Court to the contemporaneous construction by department officials who have been called upon to act under the statute and to carry its provisions into effect. *National Lead Co.* v. *United States,* 252 U. S. 140, 145; *United States* v. *Hill,* 120 U. S. 169, 182; *Brown* v. *United States,* 113 U. S. 568, 571; see also, *United States* v. *Nice, supra,* 601; *United States* v. *Sandoval, supra.* In the last case, where the legislative and executive departments had long treated the lands of the Pueblos as Indian country and dependent communities entitled to the protection of the liquor laws, this Court, quoting from *United States* v. *Holliday,* 3 Wall. 407, 419, said:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs.

It therefore appears highly desirable that the question be passed upon by this Court before the Indian Office takes any steps to change the administrative policy heretofore pursued with respect to these Indian colonies.

3. The question is of importance not only to the Indians in the colony here involved but also to the Indians for whose benefit numerous similar tracts have been purchased.

There are a number of these Indian colonies or rancherias throughout the Western States which may be affected by the decision in this case. The

Secretary of the Interior reports that 613,000 acres of land in sixteen different States have been purchased for the establishment of these Indian colonies or rancherias. Appropriations have been made for the support and civilization of the Indians residing thereon. These Indians are therefore wards of the United States and need all the protection that the Government can give them. One protection is that against the introduction of intoxicating liquor. If the Indian liquor laws do not apply to these lands the effective use for which they were purchased and are being maintained will be seriously impaired. The decision of the court below should therefore not be permitted to stand without review by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
*Solicitor General.*

JUNE 1937.

# APPENDIX

The following sections of Title 25, U. S. C., deal with the introduction, etc., of intoxicating liquor into the Indian country:

SEC. 241. *Intoxicating liquors; sale to Indians or introducing into Indian country.*—No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than $300 for each offense.

Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall in-

troduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than $100 for the first offense and not less than $200 for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department. (R. S. § 2139; Feb. 27, 1877, c. 69, § 1, 19 Stat. 244; July 23, 1892, c. 234, 27 Stat. 260; Jan. 30, 1897, c. 109, § 1, 29 Stat. 506.)

SEC. 244. *Possession of intoxicating liquors in Indian country.* Possession by a person of intoxicating liquors in the Indian country or where the introduction is or was prohibited by treaty or Federal statute shall be an offense and punished in accordance with the provisions of section 241 of this title. (May 25, 1918, c. 86, § 1, 40 Stat. 563; June 30, 1919, c. 4, § 1, 41 Stat. 4.)

SEC. 246. *Searches and seizures.*—If any superintendent of Indian affairs, Indian agent, or subagent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, subagent, or commanding officer, may cause the boats, stores, packages

wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. In all cases arising under this section and section 241, Indians shall be competent witnesses. (R. S. § 2140.)

SEC. 247. *Vehicles subject to seizure whether used by owner or other persons.*— Automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 246 of this title. (Mar. 2, 1917, *c.* 146, § 1, 39 Stat. 970.)

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